Due service of the within Supplement Correcting Record References in Brief is hereby acknowledged this____day of October, A. D. 1938.

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Counsel for Petitioners.

SUPREME COURT
OF THE
UNITED STATES.

October Term, 1938
No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON and ALFRED F. MACDONALD,
Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, GEORGE I. COCHRAN, *et al.*,
Respondents.

BRIEF OF RESPONDENT GEORGE I. COCHRAN.

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I.

Opinions Below.

The opinion of the Supreme Court of California is now officially reported.[1] It is printed in the record.[2] The oral opinion of the trial court is also printed in the record.[3]

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[1] 10 Cal. (2d) 307.
[2] R. 1509-1544.
[3] R. 1469-1506.

II.

Statement of the Case.

This respondent, George I. Cochran, with others intervened in the proceedings in the lower court in California at their inception.[4] Respondent was then the Chairman of the Board of Directors of The Pacific Mutual Life Insurance Company of California. Prior to July 22, 1936, and up until 1935, this respondent was the President of the company. The record does not show how many years respondent was President, but it will be admitted that he held that office for some thirty years. It appears generally throughout the record that the growth of the company was very rapid in the last several years during the time respondent was President.

Respondent is both a policyholder and a stockholder in The Pacific Mutual Life Insurance Company of California.[5] When the old company was reorganized, respondent was not named by the Insurance Commissioner as a director or officer of the reorganized company.

This brief is filed by respondent, as a respondent, since he appears as such in the petition for the writ of certiorari. As former President of the old company, for many years, and as the Chairman of its Board of Directors at the time of the reorganization by the Insurance Commissioner, respondent feels that there is a duty imposed upon him, not only to protect his own interests as a policyholder and stockholder, but also to protect the interests of

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[4] R. 233.
[5] R. 233.

all other policyholders and stockholders in the old company. He, therefore, files this brief on behalf of himself and all other policyholders and stockholders of the old company.

This respondent did not file a brief in opposition to the petition for the writ of certiorari. He read that petition and was in full agreement with it. Although this respondent agrees with the points and arguments contained in the brief filed in support of the petition for the writ of certiorari and the supplemental brief filed by the petitioners herein, he files this brief in order to bring to the attention of this court certain important questions and the bearing of the Constitution upon them which, in his view, are not fully developed in the briefs already on file. His discussion is limited to Points "G", "H" and "J", so designated in the brief filed in support of the petition for writ of certiorari.

Respondent George I. Cochran is a lawyer, being admitted to the Bar of California some fifty years ago and is still a member of that Bar in good standing. He is not admitted to practice before the Supreme Court of the United States and therefore files this brief *pro se*.

The statement of facts under the heading "A" in the petition for writ of certiorari is full and correct.[6] Relying upon that statement of facts and, in the interest of brevity, no further statement of the facts will be made here.

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[6]Petn. 4-11.

III.

ARGUMENT.

Summary of the Argument.

POINT A.

The Insurance Commissioner of California, in reorganizing The Pacific Mutual Life Insurance Company of California, acted without legislative authority. If he did not act without legislative authority, then the legislature has made an unlawful delegation of power to the Insurance Commissioner.

California Insurance Code, sec. 1043; *Schechter v. U. S.,* 295 U. S. 495; *Panama Refining Co. v. Ryan,* 293 U. S. 388; 12 *Corpus Juris* 850; *Application of People by Van Schaick,* 268 N. Y. S. 88; *People by Van Schaick v. National Surety Company,* 191 N. E. 521; *Matter of People (Title and Mortgage Guarantee Company of Buffalo),* 190 N. E. 153; *Home Building & Loan Assn. v. Blaisdell,* 290 U. S. 398; *Doty v. Love,* 295 U. S. 64.

Point B.

The contracts of the non-can policyholders have been impaired in violation of Article I, Section 10, of the Federal Constitution.

14 *R. C. L.* 855; 32 *Corpus Juris* 1051; 1 *A. L. R.* 598; 15 *Fletcher, Cyclopedia Corporations,* 491; *Canada So. R. Co. v. Gebhard,* 109 U. S. 527; *Lovell v. St. Louis Mutual Life Insurance Co.,* 111 U. S. 264; *Gilfillan v. Union Canal Co. of Pa.,* 109 U. S. 401; 14 *R. C. L.* 853; 32 *Corpus Juris* 1039; *California Insurance Code,* sec. 1043; *California Statutes* 1935, Chap. 145; *Northern P. R. Co. v. Minn.,* 208 U. S. 583; 12 *American Juris,* sec. 389; *California Insurance Code,* sec. 1033; *Universal Life Insurance Co. v. Binford,* 76 Va. 103; 5 *Joyce on Insurance,* sec. 3596; *In Re Albert Life Ass. Co.,* 39 L. J. Ch. 539; 48 *A. L. R.* 107; 107 *A. L. R.* 1233.

POINT A.

The Insurance Commissioner of California, in Reorganizing the Old Company, Acted Without Legislative Authority

The discussion under this point is limited to a discussion of Points "G" and "H", so designated in the brief filed in support of the petition for writ of certiorari.[7]

The reorganization or rehabilitation of The Pacific Mutual Life Insurance Company of California was accomplished by the Insurance Commissioner, an administrative officer, and the lower court,[8] under a statute which provided that the Insurance Commissioner might "enter into rehabilitation agreements".[9] These words, to "enter into rehabilitation agreements", are the only statutory authority for the course of conduct pursued by the Insurance Commissioner of California.

This respondent contends, as do petitioners, that in order for the Insurance Commissioner to interfere with the contractual rights of the policyholders of an insurance company, there first must be an express statutory authorization. In addition to the statutory authorization, the method of procedure of the Insurance Commissioner must also be provided for in the statute. Only the legislature may interfere with vested contract rights, and the legislature may only do so when it passes a valid law in

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[7]Petn. 48-51.

[8]The Superior Court of Los Angeles County.

[9]*California Insurance Code*, sec. 1043, Appendix p. 25. All California Code sections referred to in this brief are printed in the appendix.

the exercise of the police power. In the present case, it cannot be contradicted that the Insurance Commissioner adopted a plan, and the court approved a plan, which seriously interfered with the contractual rights of all the policyholders involved in the reorganization. There was no statutory authorization for this procedure, except as provided for in Section 1043 of the Insurance Code of California. The legislature, therefore, has made no provision in the statute for the reorganization of an insurance company, and has provided no plan whereby the contractual rights of the policyholders may be interfered with.

The Insurance Commissioner cannot take the place of the legislature. He is only an administrative officer. Carpenter, the Insurance Commissioner, was proceeding under a section of the Insurance Code of California[1] which gave him only the limited power to "enter into rehabilitation agreements". Under the guise of the meager legislative authority contained in that section,[2] he proposed a plan which interfered with the rights of all the policyholders of the insurance company, and in particular discriminated against the rights of the non-can policyholders. The lower court approved that plan.[3] So did the Supreme Court of California.[4]

Neither the court nor Carpenter could interfere with the rights of the policyholders of the Insurance Company without a valid act of the legislature providing that the

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[1]*California Insurance Code,* sec. 1043, Appendix p. 25.
[2]*California Insurance Code,* sec. 1043, Appendix p. 25.
[3]R. 1378-1395.
[4]R. 1509-1544.

Insurance Commissioner might propose, and the court approve, a plan which would discriminate or classify policyholders upon different bases. Only the legislature may thus exercise the police power, and the legislature has not so provided in Section 1043 of the Insurance Code of California or in any other section of that Code.

If it should be considered by this court that the vague words, to "enter into rehabilitation agreements", are a sufficient statutory authorization for the Insurance Commissioner to propose a plan of reorganization which discriminates between various classes of policyholders, then the legislature of California has unlawfully delegated its power to the Insurance Commissioner.

It is settled law in the United States that a legislature may not delegate its authority to prescribe the standards of legal obligation.[5] It is true, of course, that so long as a policy is laid down and a standard established by statute, no unconstitutional delegation of legislative power is involved.

But that was not what was done here. The legislature, instead of definitely acting within its police power and prescribing the standards relating to the reorganization of insolvent insurance companies, has set up no standards aside from the vague general statement of to "enter into rehabilitation agreements". In view of the scope of that broad declaration, and also in view of the fact that no

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[5] *Schechter v. U. S.*, 295 U. S. 495; *Panama Refining Co. v. Ryan*, 293 U. S. 388.

restrictions are imposed, the discretion of the Insurance Commissioner of California in thus enacting laws for the reorganization of insolvent insurance companies is virtually unfettered. The legislature must enact the laws. It has been held many times in the United States that:

> "Acts providing for the preparation by the insurance commissioners and the adoption of a 'standard policy' delegate legislative power and are unconstitutional."[6]

Therefore, the authority thus conferred by Section 1043 of the Insurance Code, if it is so conferred as held by the Supreme Court of California, is an unconstitutional delegation of legislative power.[7]

The Supreme Court of California in its opinion cited and relied upon the *National Surety Company* case of New York.[8] The Supreme Court of California further relied upon the affirmance of the *National Surety Company* case by the New York Court of Appeals in *People by Van Schaick v. National Surety Company.*[9] The affirmance of the *National Surety Company* case by the New York Court of Appeals is stated in the opinion of the Supreme Court of California to have been on the

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[6]12 *Corpus Juris* 850, sec. 336.

[7]*Schechter v. U. S.*, 295 U. S. 495; *Panama Refining Co. v. Ryan*, 293 U. S. 388.

[8]*Application of People by Van Schaick*, 268 N. Y. S. 88 R. 1535-1536.

[9]191 N. E. 521.

authority of *Matter of People (Title & Mortgage Guaranty Company of Buffalo)*.[1]

Contrary to the repeated statements of the Supreme Court of California[2] contained in its opinion, the Court of Appeals of New York has never squarely passed upon the validity of the proceedings had in the *National Surety Company* case. In the Appellate Division,[3] the court indicated that it was not considering the point of excessive delegation of power to the Superintendent of Insurance under the statutory authority to formulate plans of rehabilitation. The Court of Appeals confirmed the case on the purported authority of *Matter of People (Title & Mortgage Guaranty Co. of Buffalo)*.[4] That case, however, as appears from the report, was not at all concerned with the validity of the New York Insurance law but was concerned with the validity of the so-called Schackno Act relating to the reorganization of mortgage guarantee companies under a state law very similar to 77B of the Bankruptcy Act. The *National Surety Company* case was, of course, decided prior to the decisions of this court on the question of delegation of power.[5]

A further objection to the reorganization which took place in this case is that the California Insurance Code does not in terms or by implication purport to be a reorganization statute.

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[1]190 N. E. 153; R. 1536.

[2]R. 1535-1538.

[3]268 N. Y. S. 88.

[4]190 N. E. 153.

[5]*Schechter v. U. S.*, 295 U. S. 495; *Panama Refining Co. v. Ryan*, 293 U. S. 388.

The first paragraph of the opinion of the Supreme Court of California indicates that the proceedings were taken "* * * pursuant to the provisions of section 1043 of the Insurance Code."[6] The Supreme Court of California, in its opinion, further said: "* * * the proceedings here under review were taken under Sections 1010 to 1061 of the Insurance Code, adopted in 1935."[7]

There is nothing in any of these sections of the Code, or the Code as a whole, which deals with reorganization in the sense of either "deferred liquidation" or in the sense of modifying the contract rights of creditors.

Although the Court correctly stated that,

> "* * * several of the provisions contained therein in reference to the rehabilitation of insolvent insurance companies were new sections in this state, having been copied, substantially, from similar provisions in the New York insurance law,"[8]

the sections of the New York Insurance Law, upon the basis of which reorganizations in the true sense were permitted and held valid, are wholly missing from the California Code.

The case of *People by Van Schaick* (*National Surety Company* case)[9] deals with the subject of the New York reorganization statute as applied to insurance companies. In that case the court said that the Commissioner acted under Chapter 49 of the laws of 1933, and that that

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[6]R. 1516.
[7]R. 1532.
[8]R. 1532.
[9]268 N. Y. S. 88.

statute was a moratorium statute which authorized the Commissioner to:

> "make, rescind, alter and amend rules and regulations imposing any condition upon the conduct of the business of any insurer which may be necessary or desirable to maintain sound methods of insurance and to safeguard the interest of policyholders, beneficiaries and the public generally during such period (or emergency). Such rules may be inconsistent with existing law, and in such case it may supersede it."[1]

To the same effect see the *Title & Mortgage Guaranty Company* case.[2]

As a reorganization statute, the California Act would have been invalid unless it was based upon and asserted to be based upon emergency conditions. In *Home Building & Loan Assn. v. Blaisdell,* this court said:

> "This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community."[3]

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[1]268 N. Y. S. 88, 96.
[2]264 N. Y. 69.
[3]290 U. S. 398, 439.

The court also said:

> "An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power * * * The declarations of the existence of this emergency by the legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. (Citing cases.) The finding of the legislature and state court has support in the facts of which we take judicial notice (citing cases).
>
> In view of the nature of the contracts in question * * * the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions."[4]

In the instant case no emergency was declared to exist by the Legislature of California, nor was it asserted or found to exist by either the lower or Supreme Court.

Even if California had a moratorium statute, and even if it had been passed under a declared and recognized emergency, the action here taken would not have been valid because there is nothing in the record to show that the action was appropriate to an emergency, nor that the plan approved was a fair and reasonable exercise of emergency powers.

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[4]290 U. S. 398, 444, 445.

The Plan does not purport to be a temporary suspension of remedies or rights. It fixes them permanently. There is nothing in the plan or in the decision of the Supreme Court of California which justifies the discrimination between different classes of creditors, excepting only the bare assertion that the premiums paid by one class of policyholders were inadequate for the protection they were promised.

The statute does not purport to authorize or provide for a plan of deferred liquidation, such as was involved in *Doty v. Love*.[5] A comparison of the California Statute with the Mississippi statute involved in the case of *Doty v. Love* demonstrates this to be true.[6]

Nor can the plan adopted be said to come within the minimum requirements of deferred liquidation approved in the case of *Doty v. Love*.

In that case the statute expressly provided:

> "That this Act shall not be construed to give the Superintendent of Banks the right to diminish the assets of a closed bank to the prejudice of the depositors and creditors thereof, * * *."[7]

Not only is there no such provision in the California statute, but the approved plan of reorganization does diminish the assets of the old company to the prejudice of its creditors.

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[5]295 U. S. 64.

[6]*Doty v. Love*, 295 U. S. 64, 66, 67, 68—Footnote 1.

[7]295 U. S. 64, 66, 67, 68—Footnote 1.

In the instant case all, or substantially all, of the assets were turned over to the new company for the purpose of paying and protecting the rights of all creditors except those holding non-can policies, and permitting them to come under the reorganization without diminution of rights. Non-Can creditors were neither protected nor permitted to come in without a substantial reduction in their rights.

The plan is set forth in the approved Rehabilitation and Reinsurance Agreement,[8] and includes a provision for the establishment in the new company of a participating life insurance department. Certain assets of the company from among its general assets, subject to certain limitations, are declared to be "held absolutely for the security of and benefit of the policyholders of the participating department as though it belonged to a mutual company carrying on no other business."[9]

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[8]R. 1396-1444.

[9]R. 1408.

POINT B

The Contracts of the Non-Can Policyholders Have Been Impaired in Violation of Article I, Section 10, of the Federal Constitution.

This respondent's discussion under Point B is limited to Point "J" so designated in the brief filed in support of the Petition for Writ of Certiorari.

The contracts of the non-can policyholders have been unconstitutionally impaired under the terms of the Rehabilitation Plan. Their rights were scaled down, and the company was made solvent thereby (if ever actually insolvent), without any corresponding burden being imposed upon the other policyholders of the company. The entire burden of the reorganization was placed upon the holders of the non-can policies. Thus all policyholders of the company were not treated alike as they must be.[1]

> "But to a certain extent the majority stockholders are trustees for the minority and must exercise fairness and good faith in dealing with the assets involved in a reorganization. If they act in good faith their judgment cannot ordinarily be questioned by the minority. But they cannot, in breach of their trust, or in fraud of the rights of their stockholders, effect a reorganization in such a way as to acquire the corporate property and assets for them-

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[1] 14 *R. C. L.* 855, sec. 21; 32 *Corpus Juris* 1051, sec. 123; 1 A. L. R. 598.

It has been decided many times in the United States that the creditors of a corporation must be treated alike.

selves, thus excluding the minority from a fair participation in the fruits of the transaction."[2]

"There should be no discrimination between stockholders nor denial to them of equal rights of participation in the new company. * * *"[3]

The rule that stockholders may not discriminate against other stockholders would seem to be applicable to the policyholders of an insurance company. The life policyholders under the plan of reorganization were permitted by the court and the Insurance Commissioner to participate in the reorganization upon more favorable terms than the non-can policyholders. Respondent contends, as do the petitioners, that the non-can policyholders could not be thus discriminated against. The non-can policyholders were not given an opportunity to come into the reorganization on equal terms.

The plan of reorganization adopted by the Insurance Commissioner did not provide that a certain percentage of consenting policyholders could bind the non-consenting policyholders. In fact the plan does not require any percentage of consenters to bind the non-consenters. The record does not disclose what percentage of the policyholders of the old company consented to the plan of reorganization.

The percentage of consenters is immaterial in the light of the decision by this court in the case of *Canada So. R. Co. v. Gebhard*[4] where the court said:

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[2]15 *Fletcher, Cyclopedia Corporations,* 491-492, sec. 7296.

[3]15 *Fletcher, Cyclopedia Corporation,* 493, sec. 7296.

[4]109 U. S. 527, 535.

"In the absence of statutory authority * * * nothing can be done by a majority, however large, which will bind a minority without their consent."

See also:

Gilfillan v. Union Canal Co. of Pa., 109 U. S. 401, 403, 404.

Respondent respectfully calls to the attention of this court that the Insurance Code of California contains no provision whereby the Insurance Commissioner, or a majority of the policyholders, may bind dissenters.

It is true, as pointed out by the Supreme Court of California,[5] that the non-can policyholders did not have to accept the plan of rehabilitation and that they would be entitled to go into the liquidation proceedings and there prove the damages they had suffered from the breech of their contracts by the old company. The Supreme Court of the United States has announced the same rule, namely, that a dissenting policyholder is under no obligation to continue his insurance in the new company.[6] It is a stranger to him and, upon the breach of his policy of insurance by the insolvency of the company, his contract

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[5]R. 1538-1539.

[6]"Our second conclusion, that the complainant was under no obligation to continue his insurance in the new company, we think is equally clear. He had nothing to do with the company; it was a stranger to him. It is true that it received all the old Company's assets and assumed all its obligations on policies and otherwise; and the complainant was relegated to the new company for the obtainment of his rights, what-

is terminated[7] and he may hold the old company liable to him in damages.

Since the foregoing is true, the Insurance Commissioner and the court had to leave the dissenting non-can policyholder with the right to receive the liquidated value of his contract, which was breached by the insolvency of the company, without unreasonable delay.

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ever they were. But that was a transaction between the Companies themselves, with which he had nothing to do; and under such a total change of relations and parties, it would be most unreasonable that he should be compelled, against his will or with the alternative of abandoning all his rights, to continue all his life to fulfill an executory contract by the payment of premiums to a company to which he was a total stranger, and in which, perhaps, he reposed no confidence whatever, or to take a paid up policy in such company."

Lovell v. St. Louis Mut. Life Ins. Co., 111 U. S. 264, 273.

[7] "While there are some contrary decisions, the weight of authority supports the proposition that on the judicial adjudication of the insolvency of a stock insurance company and the appointment of a receiver the outstanding policies of the company are *ipso facto* cancelled * * *."

14 R. C. L. 853, sec. 20.

"While there is authority to the contrary, the generally recognized rule is that a decree of dissolution or an adjudication of insolvency, coupled with the appointment of a receiver, cancels or terminates outstanding policies by operation of law * * *."

32 *Corpus Juris*, pp. 1039-1040, sec. 102.

The protection of the rights of the non-can policyholders in liquidation was not taken care of by the Insurance Commissioner under the plan of rehabilitation. While the plan of rehabilitation is drawn in contemplation of claims being filed against a liquidator in a liquidation proceeding, nevertheless it is specifically provided that the reserves which the new company is to set up under the plan against all policies, shall, with respect to the non-can policies, be only to the extent required after the reduction in the benefit.[8] The new company then agreed to pay to the liquidator, after the expiration of the time for filing claims, an amount equal only to the reserves so established. The plan further provides that if, after the determination of the amount of claims due dissenting policyholders, a further payment needs to be made from the new company to the liquidator, it shall be made only out of the funds available for general corporate purposes and under the terms of Paragraph XIV.[9] Therefore, there is on the face of the plan a very effectual limitation upon the funds which will be available to pay a dividend upon non-can claims, and the dissenting non-can policyholder will fare no better than an assenting non-can policyholder, so far as his eventual recovery is concerned.

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[8]R. 1421-1422.

[9]R. 1416-1419.

The section of the statute[1] under which the reorganization was said by the court to be impliedly authorized was enacted in 1935,[2] long after most of the non-can policies went into effect and after the non-can policies of petitioners went into effect.[3]

To construe the statute retroactively, so as to affect the contract rights of non-can policyholders then in existence, violates the contract clause of the Constitution of the United States.[4]

It should also be noted that the Insurance Code of California, under which this proceeding was had, contemplates an equality of distribution, in case of insolvency, to all unsecured creditors.[5]

As pointed out above, there was no equality of distribution provided for. Furthermore, the reserves provided for in the plan of rehabilitation for dissenting life policyholders, in case of liquidation, were greater than the reserves provided for dissenting non-can policyholders.[6] Neither the Insurance Commissioner nor the court could so discriminate between the policyholders of the company.

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[1]*California Insurance Code,* sec. 1043, Appendix p. 25.

[2]*California Statutes* 1935, Chapter 145, in effect September 15, 1935.

[3]R. 245; R. 626; R. 681; R. 990; R. 1233; R. 1274.

[4]*Northern P. R. Co. v. Minnesota,* 208 U. S. 583; 12 *American Juris.,* secs. 389-390.

[5]*California Insurance Code,* sec. 1033. Appendix p. 25.

[6]R. 1421-1422.

Upon what basis of law, justice, or equity is the one class entitled to priority over the other? The old company was insolvent, as found by the Insurance Commissioner and all the creditors of the company had to be treated alike.[7]

Respondent further wishes to point out that, prior to the plan of reorganization, the non-can policyholders had a vested right in case of insolvency to look to the entire assets of the old company for the satisfaction of their claims. Under the plan of reorganization, however, the rights of the non-can policyholders upon liquidation are limited to a special fund.[8]

From the foregoing analysis, it logically follows that the contracts of the non-can policyholders have been impaired. The special reserve of Twenty-three Million Dollars, was set up with respect to the non-can policies, as respondent understands it, because of inadequate premiums,

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[7]"In distributing the assets of an insolvent insurance company the general rule is that all creditors stand on an equal footing, and this rule applies as between holders of policies of all classes, matured and unmatured, * * *."

14 R. C. L. p. 855, sec. 21.

"In the distribution of the assets of an insolvent company, the general rule is that all creditors are entitled to share equally in its assets in proportion to their claims, subject to such equities as may be created by statute or by the charter and by-laws of the company."

32 *Corpus Juris,* 1051, sec. 123.

See also:

1 A. L. R. 598.

[8]R. 1421-1422.

and was the reason why the old company was declared insolvent by the Insurance Commissioner.[9] Consequently, upon liquidation, each policyholder should be entitled to prove as his damage the profit of his contract. It seems clear that, on non-can contracts, the individual policyholder should be entitled to have the profit of his contract measured by the difference in the low premium rate actually charged him under his policy, and the premium rate which was charged, or would be charged, if a comparable company were writing a comparable kind of policy.[1]

The sum total of the non-can claims for damages should, therefore, equal the aggregate reserve set up by the Insurance Commissioner, namely, Twenty-three Million Dollars. If, as a matter of law, non-can policyholders have the right to go into the liquidation proceeding and prove up their individual claims for damages, then the aggregate of these claims would be Twenty-three Million Dollars.

Now, if the reserve to take care of such non-can claims is set up on a limited basis, as provided for by Paragraph XVII of the plan,[2] and if the amount ultimately available is to come out of the corporate funds under the limitations contained in the plan, then the non-can policyholders have not been offered an alternative, as claimed by the Supreme Court of California.[3] They really were offered no alternative at all.

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[9]R. 31.

[1]*Universal Life Insurance Co. v. Binford*, 76 Va. 103; 5 *Joyce on Insurance*, sec. 3596; *In re Albert Life Ass. Co.*, 39 L. J. Ch. 539; 48 A. L. R. 107; 107 A. L. R. 1233.

[2]R. 1421-1424.

[3]R. 1539.

CONCLUSION.

Respondent George I. Cochran submits that the petitioners have presented a case which merits the attention of this court and shows a clear violation by the Insurance Commissioner and the courts of California, both of due process of law and of the impairment of the contract clause of the Federal Constitution.

It is respectfully urged by this respondent that this court reverse the decision of the Supreme Court of California.

Respectfully submitted,

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APPENDIX.

California Insurance Code Sections Cited in the Brief.

CALIFORNIA INSURANCE CODE.

Sec. 1033:

1033. Claims allowed in a proceeding under this article shall be given preference in the following order:

1. Expense of administration; 2. Claims having preference by the laws of the United States and by the laws of this State; 3. All other claims.

Sec. 1043:

1043. In any proceeding under this article, the commissioner, as conservator or as liquidator, may, subject to the approval of said court, and subject to such liens as may be necessary mutualize or reinsure the business of such person, or enter into *rehabilitation agreements*. Such rehabilitation or reinsurance agreements shall provide that, subsequent to the date thereof and for such period of time as the commissioner may determine, no investment or reinvestment of the assets of the person rehabilitated or reinsured shall be made without first obtaining the written approval of the commissioner.

(First Par. of sec. 1043 only. Italics ours.)